Supreme Court, U. S.
FILED
MAY 25 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-1558

VIRGINIA CRAMER,
Petitioner,

v.

METROPOLITAN FEDERAL
SAVINGS AND LOAN ASSOCIATION,
Respondent.

## BRIEF FOR RESPONDENT IN OPPOSITION

McClintock Donovan Carson & Roach

By: William P. Thorpe
2150 Guardian Building
Detroit, Michigan 48226
1-313-963-3400

Interstate Brief & Record Co., Wurlitzer Bldg., 1509 Broadway, Detroit, MI 48226
962-8745 962-8746

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 1 |
| Question Presented | 2 |
| Constitutional Provisions Involved | 2 |
| Statement of the Case | 2 |
| Reasons Denying the Writ | 5 |
| Conclusion | 9 |


## INDEX TO AUTHORITIES

**Citations:**


| | |
|---|---|
| Barrera v. Security Building & Investment Corporation, 519 F2d 1166 (1975) | 8 |
| Bryant v. Jefferson Federal Savings and Loan Association, 509 F2d 511 (1974) | 8 |
| Cardinale v. Louisiana, 369 US 437, 89 S Ct 1161, 22 L Ed 2d 398 (1969) | 6 |
| Cramer v. Metropolitan Savings Association, 401 Mich 252, 261 | 5 |
| Detroit Trust Co. v. Agozzinio, 280 Mich 402, 496, 273 NW 747 (1937) | 5 |
| Equitable Trust Co. v. Barlum Realty Co., 294 Mich 167, 292 NW 691 (1940) | 7 |

Page

Herb v. Pitcairn, 325 US 117, 89 L Ed 789, 65 S Ct 459 (1944) ..... 6

Lee v. Clary, 38 Mich 223 (1978) ..... 5

Levine v. Stern, 560 F2d 1175 (1977) ..... 8

Markoff v. Tournier, 229 Mich 571, 201 NW 888 (1925) 5

Murdock v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875) ..... 6

Neblett v. Carpenter, 305 US 297, 83 L Ed 182, 59 S Ct 170 (1938) ..... 6

Northrip v. Federal National Mortgage Association, 527 F2d 23 (1975) ..... 8

Peterson v. Jacobs, 303 Mich 329, 335, 6 NW2d 533 (1942) 5

Roberts v. Cameron-Brown Co., 556 F2d 356 (1977) ... 8

Tacon v. Arizona, 410 US 351, 35 L Ed 346, 935 S Ct 998 (1973) ..... 6

White v. Burkhardt, 338 Mich 235, 239; 60 NW2d 925 (1953) ..... 5,7

**Statutes:**

MCLA § 600.3201, MSA 27A.3201 ..... 7

28 USCA § 1257(3) ..... 1

28 USCA § 1652 ..... 1

12 USCA § 1257(3) ..... 6

**Miscellaneous:**

U.S. Sup. Ct. Rule 40 ..... 9


**IN THE**

# Supreme Court of the United States

**October Term, 1977**

**No. 77-1558**

**VIRGINIA CRAMER,**
**Petitioner,**

**v.**

**METROPOLITAN FEDERAL**
**SAVINGS AND LOAN ASSOCIATION,**
**Respondent.**

## BRIEF FOR RESPONDENT IN OPPOSITION

### OPINION BELOW

Respondent does not question the opinions listed in the Petition.

### JURISDICTION

Respondent does not question Petitioner's invoking of 28 USCA § 1257(3) for purposes of jurisdiction, but does question whether 28 USCA § 1652 provides any jurisdictional grounds hereunder.

## QUESTION PRESENTED

Petitioner presents no question or questions properly reviewable on certiorari. The only federal question raised below was whether the Michigan statute providing for nonjudicial foreclosure of mortgages on real property violates the Fourteenth Amendment.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment: ". . . nor should any state deprive any person of life, liberty or property without due process of law."

## STATEMENT OF THE CASE

Although some of the relevant facts along with many irrelevant facts are scattered through Petitioner's unduly lengthy Petition, a precise summary is required for a determination on her Petition.

In 1963, Petitioner, Virginia Cramer (hereinafter "Mrs. Cramer") applied for and obtained a commitment for purchase money mortgage for a new house from the Respondent, Metropolitan Federal Savings and Loan Association (hereinafter "Metropolitan").[1] On July 29, 1963, Mrs. Cramer executed a mortgage note (Petition, pp 18-20) and a mortgage (Petition, pp 20-23). Mrs. Cramer commenced payments and during subsequent years a

[1] At that time the Respondent was chartered under the laws of the United States. During the course of these proceedings Respondent was chartered under the laws of the State of Michigan with a resulting name change and is sometimes referred to in the proceedings below as Metropolitan Savings Association.



controversy arose over the amounts required to be paid pursuant to paragraph 2 of the mortgage. Such amounts, commonly called escrow, were for monthly prepayments of taxes, assessments and insurance premiums and were, as stated in said paragraph, "In order to more fully protect the security of the mortgage. . .".

Subsequently, upon Mrs. Cramer's failure to maintain the required escrow balance, and pursuant to paragraph 8 of the mortgage, Metropolitan accelerated the entire balance and pursuant to the power of sale also contained in paragraph 8, commenced a nonjudicial foreclosure on May 23, 1968.

On August 12, 1968, Mrs. Cramer, prior to sale, commenced the instant action and obtained a temporary restraining order restraining the sale. On August 16, 23, 30 and September 6, 1968, hearings were held in the Wayne County Circuit Court on the temporary restraining order and pursuant to such hearings, the temporary restraining order was dissolved and the property was sold at a sheriff's sale on October 1, 1968. Mrs. Cramer redeemed from the sale on June 5, 1969.

After further preliminary proceedings not herein pertinent, Mrs. Cramer filed a Second Amended Complaint (Petition, App. "H") alleging breach of contract, abuse of person, libel and slander, breach of fiduciary relationship, invasion of privacy, and intentional infliction of emotional distress. All theories were predicated on the above factual situation and were dependent on Mrs. Cramer proving a wrongful foreclosure.

Subsequently, during the numerous proceedings below, the trial courts determined that Mrs. Cramer had defaulted under the terms and conditions of the mortgage,

that Metropolitan as mortgagee was entitled to commence foreclosure of the mortgage pursuant to the power of sale, and that Metropolitan had complied with the Michigan statute governing nonjudicial foreclosures of real property.

Mrs. Cramer alleged other theories in her Second Amended Complaint (Petition, App. "H"), all dependent on proof of a wrongful foreclosure and, therefore, the trial court dismissed Mrs. Cramer's Second Amended Complaint on Summary Judgment (Petition, App. "I").

Mrs. Cramer appealed to the Michigan Court of Appeals. That Court upheld the trial court as to the propriety of the foreclosure, but remanded Count IV "Breach of Fiduciary Relationship" for trial (Petition, App "J"). That part of Mrs. Cramer's claim went to a jury trial resulting in a verdict favorable to Metropolitan. (Petition, App. pp. 77, 78). Mrs. Cramer again appealed to the Michigan Court of Appeals which affirmed its previous opinion and affirmed the jury verdict (Petition, App "C").

Mrs. Cramer applied for and obtained Leave to Appeal to the Michigan Supreme Court. The Michigan Supreme Court affirmed the propriety of the foreclosure and proceedings below and also held that the Michigan Foreclosure Statute did not violate the Fourteenth Amendment to the United States Constitution and Art. 1, Section 17 of the Michigan Constitution.



## REASONS FOR DENYING WRIT

### I

### THE LEGALITY OF THE FORECLOSURE IS A STATE MATTER NOT INVOLVING A FEDERAL QUESTION

The decision of the Michigan Supreme Court affirming the decision of the Michigan Court of Appeals affirming the Summary Judgment of the trial court upholding the propriety of the foreclosure rests on adequate and independent state law. The Michigan Supreme Court interpreted the foreclosure by advertisement remedy in the mortgage as an incident of the private right of contract stating in the instant matter, *Cramer* v. *Metropolitan Savings Association*, 401 Mich 252, 261:

> Recognizing the parties' prerogative to provide for their own contract, we said in *White* v. *Burkhardt*, 338 Mich 235, 239; 60 NW2d 925 (1953):
>
> > 'Foreclosure of mortgages by advertisement and sale has been in use in this State for about 100 years, and is well understood. Such statutory foreclosures should not be set aside without some good reason therefor. *Markoff* v. *Tournier*, 229 Mich 571, 201 NW 888 (1925), and *Detroit Trust Co.* v. *Agozzinio*, 280 Mich 402, 496, 273 NW 747 (1937). Statutory foreclosures are a matter of contract, authorized by the mortgagor, and ought not to be hampered by an unreasonably strict construction of the law. *Lee* v. *Clary*, 38 Mich 223 (1978) and *Peterson* v. *Jacobs*, 303 Mich 329, 335, 6 NW2d 533 (1942).'

Since the propriety of the foreclosure rested on independent and adequate state grounds, this Court on jurisdictional grounds should not grant a petition for certiorari pursuant to 12 § USCA 1257(3) concerning interpretation of a private contract to wit: the provisions of the mortgage, default thereunder, compliance with the foreclosure statute and all other matters collateral thereto and therefore dependent thereon, i.e., the theories alleged in Mrs. Cramer's Second Amended Complaint. *Murdock* v. *City of Memphis*, 20 Wall 590, 22 L Ed 429 (1875), *Herb* v. *Pitcairn*, 325 US 117, 89 L Ed 789, 65 S Ct 459 (1944). Such matters have been finally decided by the Michigan Supreme Court, *Neblett* v. *Carpenter*, 305 US 297, 83 L Ed 182, 59 S Ct 170 (1938).

## II.

### MATTERS NOT RAISED IN THE PROCEEDINGS BELOW NOT GROUNDS FOR GRANTING CERTIORARI

Mrs. Cramer, in her Petition, for the first time in the lengthy proceedings underlying this matter, has alleged violation of the anti-trust, civil rights laws, and other possible theories not specifically enumerated. Such claims have not been duly raised below and should not be raised on certiorari. *Cardinale* v. *Louisiana*, 369 US 437, 89 S Ct 1161, 22 L Ed 2d 398 (1969); *Tacon* v. *Arizona*, 410 US 351, 35 L Ed 346, 935 S Ct 998 (1973).



## III

### THE MICHIGAN SUPREME COURT'S DETERMINATION THAT THE MICHIGAN FORECLOSURE BY ADVERTISEMENT STATUTE DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION OR ARTICLE I, SECTION 17 OF THE MICHIGAN CONSTITUTION AS A VIOLATION OF DUE PROCESS OF LAW IS IN ACCORD WITH THE DECISIONS OF THIS COURT AND THE SEVERAL UNITED STATES COURTS OF APPEAL.

The Michigan Supreme Court held that the existence of a Statute, MCLA § 600.3201, MSA 27A.3201, which permitted a mortgagee to foreclose nonjudicially by advertisement pursuant to the provisions contained in the mortgage did not constitute state action.

The power of sale contained in the mortgage has been held as an incident of the private right to contract. *Equitable Trust Co.* v. *Barlum Realty Co.*, 294 Mich 167, 292 NW 691 (1940). The option to foreclosure nonjudicially is a contract remedy long recognized in Michigan and the courts have recognized the parties' prerogative to so provide. *White* v. *Burkhardt, supra.*

The specific question of whether the Michigan Foreclosure by Advertisement Statute violated due process in that it required neither a notice of hearing nor a hearing to establish the debt was specifically decided by the Michigan Supreme Court.[2] The Michigan Supreme Court

---

[2] Mrs. Cramer had been involved in innumerable court hearings on the subject during the ten year history of this litigation.

relied upon the Sixth Circuit Court of Appeals' opinion in *Northrip* v. *Federal National Mortgage Association*, 527 F2d 23 (1975), in construing the same Michigan statute, and found no significant state action holding that the due process clause is a limitation on governmental action, not private action.

The same attack has been determined by other circuits upon similar provisions in mortgages for execution of the power of sale or like accelerations by the mortgagee and foreclosure by nonjudicial action, usually involving advertisement in a local paper and posting on the property. The courts have uniformly found that the procedure was a private contractual matter and found no significant state action invoking Fourteenth Amendment protection. The District of Columbia's statute withstood the same challenge in *Bryant* v. *Jefferson Federal Savings and Loan Association*, 509 F2d 511 (1974); the Texas statute in *Barrera* v. *Security Building & Investment Corporation*, 519 F2d 1166 (1975); the Virginia statute in *Levine* v. *Stern*, 560 F2d 1175 (1977); and the Georgia statute in *Roberts* v. *Cameron-Brown Co.*, 556 F2d 356 (1977).

There is no compelling reason to grant certiorari under the facts and cases stated above.



## CONCLUSION

It is respectfully submitted that Mrs. Cramer has failed to sustain her burden of establishing special and important reasons for granting a Writ of Certiorari. U.S. Sup. Ct. Rule 40. The decision of the Michigan Supreme Court concerning interpretation of the mortgage, foreclosure and other proceedings soundly rest on independent and adequate state law. The identical due process issue has been uniformly decided by various Circuit Courts of Appeal. Those opinions are in accord with the decisions of this Court. For the reasons stated above Mrs. Cramer's Petition should be denied.

Respectfully submitted,

McClintock Donovan Carson & Roach

By: William P. Thorpe
2150 Guardian Building
Detroit, Michigan 48226
1-313-963-3400

Dated: May 22, 1978